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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PATRICK W. SIMMONS,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,

Respondents.

On Petition for A Writ of Certiorari to The United States Court of Appeals for the Seventh Circuit

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BRIEF OF RAILWAY LABOR EXECUTIVES' ASSOCIATION, AS *AMICUS CURIAE*, IN SUPPORT OF PETITION

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BRIEF OF RAILWAY LABOR EXECUTIVES' ASSOCIATION, AS *AMICUS CURIAE*, IN SUPPORT OF PETITION

On September 13, 1985, petitioner Patrick W. Simmons, the Legislative Director of the United Transportation Union for the State of Illinois, filed a petition with this Court for the issuance of a writ of certiorari to review two separate decisions by the United States Court of Appeals for the Seventh Circuit upholding the refusal of the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] to provide a fair arrangement to protect the interests of employees affected by sales of rail lines pursuant to 49 U.S.C. § 10905. The Railway Labor Executives' Association [hereinafter, "RLEA"] has obtained the written consent of the above-listed respondents to file

a brief with this Court as an *amicus curiae.*[1] This brief, therefore, is respectfully submitted by RLEA as an *amicus curiae* in support of the petition for a writ of certiorari to review the decisions by the court of appeals in *Simmons v. ICC* [hereinafter, "*Simmons I*"], 760 F.2d 126 (7th Cir. 1985), and in *Simmons v. ICC* [hereinafter, "*Simmons II*"], 766 F.2d 1177 (7th Cir. 1985).

INTEREST OF AMICUS CURIAE

Amicus RLEA is a voluntary, unincorporated association of the Chief Executive Officers of nineteen standard labor organizations which collectively represent virtually all organized railroad employees in this Country.[2] RLEA has been the policy spokesperson for its member organizations before Congress, the Courts and the ICC for more than seventy-five years and has stated rail labor's position on matters which affect rail employees generally, including, as is relevant to this case, the manner in which the ICC considers and protects the interests of employees who may be affected by financial transactions approved by the Commission.

Rail labor, and in particular, RLEA, has been actively involved for years in appearing before Congress, before the federal courts and before the ICC to insure that railroad employees are treated fairly whenever the ICC approves a transaction that affects their interests. *See, Hearings on S. 1946, Before Senate Committee on Commerce, Science and Transportation,* 96th Cong., 1st Sess. at 536 (1979); *United States v. Lowden,* 308 U.S. 225 (1939). Those appearances, together with Congress' awareness that rail employees are an essential part of our national transportation system, have resulted in a regulatory scheme which sets forth as one of its goals the need "to encourage fair wages and safe and suitable working conditions in the railroad industry" (49 U.S.C. § 10101a(12)), and which requires the ICC to consider the impact which a merger or other major transaction may have on the interests of rail

[1] RLEA has filed with the Clerk of this Court the written consents from all parties to its filing this brief as an Amicus Curiae.

[2] RLEA's member organizations are listed on Appendix A to this brief.

employees. *E.g.*, 49 U.S.C. § 11344(b)(1)(D). Moreover, that statutory scheme expressly requires the Commission, in specific instances, to provide a fair arrangement to lessen the impact of certain transactions on employees (*e.g.*, 49 U.S.C. §§ 10903(b)(2), and 11347), and it has been held to permit the imposition of such protections even where not expressly required. *E.g., ICC v. RLEA*, 315 U.S. 373 (1942).

The degree of rail labor's involvement in devising the current regulatory scheme for the rail industry has been extensive and Congress' willingness to solicit that involvement has been simply a recognition of the continued validity of what this Court stated more than forty years ago:

> One must disregard the entire history of railroad labor relations in the United States to be able to say that the just and reasonable treatment of railroad employees in mitigation of the hardship imposed on them in carrying out the national policy of railway consolidation, has no bearing on the successful prosecution of that policy and no relationship to the maintenance of an adequate and efficient transportation system.

United States v. Lowden, supra, 308 U.S. at 234. As this Court added (*Id.* at 235-36):

> The now extensive history of legislation regulating the relations of railroad employees and employers plainly evidences the awareness of Congress that just and reasonable treatment of railroad employees is not only an essential aid to the maintenance of a service uninterrupted by labor disputes, but that it promotes efficiency, which suffers through loss of employee morale when the demands of justice are ignored.

Congress and the courts were not the only ones to recognize the vital role which rail employees played in maintaining an efficient rail transportation system for, until recently. the ICC had also appreciated the significance of an efficient labor force.

Even though it required some prodding by this Court, the ICC developed and followed until 1982 the policy of both considering the interests of rail employees and protecting those interests in cases involving regulatory approvals which would have an impact on employees, even where the Interstate Commerce Act did not expressly require such protection. *E.g., Durango & Silverton Narrow Gauge R.R.—Acquisition,* 363 I.C.C. 292 (1979); *Chicago, Burlington & Quincy R.R.—Abandonment,* 257 I.C.C. 700 (1944).

In 1976, Congress modified to a degree the Commission's discretion in this area by amending the abandonment provisions of the Act to mandate that the Commission impose a fair arrangement to protect affected rail employees whenever it issued any abandonment or discontinuance of operations authorization. Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 802, § 90 Stat. 31, adding 49 U.S.C. § 10903(b)(2) (as recodified). Consequently, since 1976, the ICC must impose a fair arrangement to protect employees whenever it authorizes an abandonment of rail lines or a discontinuance of rail operations. 49 U.S.C. § 10903(b)(2).[3]

In the two *Simmons* cases which petitioner seeks to place before this Court for review, the Seventh Circuit upheld the ICC's conclusion that even though employee protection was mandatory whenever a railroad abandoned a portion of its lines, such protection was neither required nor permitted when the railroad sold that line under Section 10905 for continued rail operations. Appendix to Petitioner's Brief at 28a. That conclusion raises grave concerns for rail labor because: (1) it leaves employees affected by such a sale without protection or even a guarantee of a job with the new operator, contrary to other provisions of the Interstate Commerce Act; (2) it encourages railroads to use the abandonment-Section 10905 sale route

[3] The ICC and the courts have concluded that there is a limited exception to Section 10903(b)(2) where the abandonment involves the entire line of a small railroad which is not affiliated with another railroad. *RLEA v. ICC,* 735 F.2d 691 (2d Cir. 1984.)

to avoid employee protection obligations,[4] and, in effect, it uses the possibility of escaping labor protection costs as an incentive for selling, rather than abandoning, a line which does not contribute an adequate rate of return to the selling carrier; and (3) it distorts the intent of Congress to support a result which anyone even remotely familiar with this subject knows was never contemplated by Congress or by those who supported this legislation—*e.g.*, the ICC and rail labor. In short, RLEA submits that this case presents an issue which is extremely important to rail labor, not only because it deprives a whole class of employees of benefits to which they are entitled under Section 10903(b)(2) of the Interstate Commerce Act, 49 U.S.C. § 10903(b)(2), but also because it construes the Interstate Commerce Act in a way that reverses more than forty (40) years of viewing employee protection as being remedial and necessary to the orderly administration of the Interstate Commerce Act.

The question of whether Section 10905 prohibits the imposition of employee protection is becoming more important each year as more and more carriers use its provisions to sell rail lines. In fiscal year 1982, when the ICC had not stated that it would not impose employee protection in Section 10905 sales, the ICC's annual report to Congress did not indicate that any applications were filed under Section 10905, even though the ICC had authorized railroads to abandon over 3,100 miles of track during that year. However, during that same fiscal year, the Commission received a dozen inquiries to acquire abandonable lines under the feeder-line program which was established in 1980 by Section 10910 of the Interstate Commerce Act, but

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[4] Indeed, RLEA submits this has already occurred, for in the ICC order being reviewed in *RLEA v. ICC*, 2d Cir. No. 85-4093, the ICC allowed a subsidiary of the CSX railroad system, the Staten Island Railroad Corporation, to sell its lines to a newly formed subsidiary of a short line railroad operator without requiring the railroads to provide any protection for the affected employees. This sale was allowed under § 10905 even though the railroads appear to have made an agreement in principal to use § 10905 before the line was designated as being subject to abandonment. 49 U.S.C. § 10904(e). *See*, Joint Appendix in 2d Cir. No. 85-4093 at 58, 61.

which specifically required the use and protection of the selling carrier's employees. 49 U.S.C. § 10910(e) and (j). *See,* 1982 Fiscal Year Annual, Report of ICC at 38-39. In fiscal 1983, when the ICC announced its policy against employee protection, no feeder-line inquiries were filed, but "[t]he number of persons making offers of financial assistance continued to grow during the fiscal year" with "seventeen offers (16 to purchase lines and one to subsidize continued operations) involving 411 miles" being made. 1983 Fiscal Year Annual Report of ICC at 40-41. This trend has continued into fiscal year 1984 (*see,* 1984 Fiscal Year Annual Report of ICC at 40), and appears to be increasing in late 1985. *See,* ICC Docket No. AB-8 (Sub-No. 8), *Denver & Rio Grande Western R.R.—Abandonment,* served November 8, 1985 (unpublished) (purchase offer under § 10905 to purchase 114.51 miles of track), *pet. for review pending.*

Since the question of the validity of the ICC's narrow construction of Section 10905 is important to rail employees, RLEA has filed this brief in support of the petition by Mr. Simmons.

REASONS FOR GRANTING THE WRIT

The Decisions By The ICC And By The Seventh Circuit Have Decided An Issue Important To Rail Labor In A Manner Which Distorts The Intent Of Congress And Conflicts With Applicable Decisions By This Court Which Require That Remedial Legislation Be Construed Broadly So As to Achieve The Purposes For Which That Legislation Was Enacted

In the early 1940's, the ICC took the position that, since Congress did not include in the Interstate Commerce Act's abandonment provisions a specific requirement for employee protection, as it had done in the Act's consolidation provisions, the Commission did not have the authority to impose such provisions on an abandonment authorization. That position was rejected by this Court in *ICC v. RLEA,* 315 U.S. 373 (1942), when this Court, after reviewing the statutory language, stated that: "The phrase 'public convenience and neces-

sity' [which governed abandonment requests] no less than the phrase 'public interest' [which governed consolidation requests] must be given a scope consistent with the broad purpose of the Transportation Act of 1920: to provide the public with an efficient and nationally integrated railroad system." 315 U.S. at 376-77. This Court then concluded that, since the just and fair treatment of railroad employees promotes that national interest, the Commission had the authority to protect railroad employees who may be affected by abandonments, even though Congress did not specifically require such protection. 315 U.S. at 377-78. Once this Court corrected the ICC's views as to its authority, the Commission adopted the policy of imposing employee protection in all abandonment authorizations, except those involving the abandonment of an entire line. *E.g., Chicago, Burlington & Quincy R.R.—Abandonment,* 257 I.C.C. 700 (1944).

While it was in this frame of mind, the Commission viewed abandonment/discontinuance transactions realistically and would impose an employee protection obligation even where the end result of the transaction was the sale of the line; according to the Commission, it viewed the effect on the employees as being the important criteria, for form should not govern over substance. As the Commission stated:

> While the Commission is not required by statute to impose labor protective conditions in proceedings where newly formed noncarriers will become carriers through the acquisition and operation of lines of railroad as here, it does have the discretion to do so where the interests of employees may be adversely affected by the proposal. In *Prarie* [*sic*] *Trunk Railway—Acquisition and Operation,* 348 I.C.C. 832 (1977) and *Cadilac* [*sic*] *& Lake City Ry. Co. Acquisition and Operation,* 320 I.C.C. 617 (1964), the Commission imposed such conditions, with the costs to be borne by the selling carrier. In both cases, the vendors had filed abandonment applications for the rail lines in question, but those applications were dismissed. Notwithstanding the dismissal of the abandonment applications, the Commission, in each

> case, noted that the principle result or benefit of the proposal would be the cessation by the vendor of operation of the line. Since employees of the vendors would be affected by the proposal and since each vendee was a new carrier that had not operated previously, the Commission imposed the burden of labor protection costs upon the vendors . . . .

Durango & Silverton Narrow Gauge R.R.—Acquisition and Operation, 363 I.C.C. 292, 295 (1979).

Consequently, when Section 10905's predecessor, Section 1a(6), was first added to the Interstate Commerce Act in 1976, the Commission had an established policy of imposing em-employee protection where the substance of a transaction involved an abandonment or discontinuance, even though the line involved was being sold for continued rail operations.

In 1976, Congress passed the Railroad Revitalization and Regulatory Reform Act [hereinafter, "4R Act"], Pub. L. No. 94-210, 90 Stat. 31, which, as relevant to this case, amended the Interstate Commerce Act in two respects. First, Section 802 of the 4R Act modified substantially the abandonment provisions of the Act and added the requirement in what is now 49 U.S.C. § 10903(b)(2) that abandonments, which are to be authorized by a certificate, shall be conditioned by "provisions for the protection of the interests of employees." Consequently, the 4R Act modified prior law by making employee protection mandatory, and not discretionary, in abandonment cases. *See,* H. Rpt. No. 94-781, 94th Cong., 2d. Sess. at 218-19 (1976). And second, that same section of the 4R Act added a new provision to the abandonment section which, in effect, codified the ICC's past practice of encouraging the sale or continued operation of a rail line which a railroad wished to abandon. That provision became Section 1a(6) of the Interstate Commerce Act and was subsequently recodified as Section 10905 in 1978 by the recodification statute, Pub. L. No. 95-473, 92 Stat. 1337. Prior to 1980, the ICC did not view Section 10905, or its predecessor Section 1a(6), as overruling its prior practice of imposing employee protection in abandonment-sale cases. *See, Abandonment of Railroad Lines And Discontinuance of Service,* 354 I.C.C. 252, 270 (1976).

Four years after the 4R Act was signed into law, Congress passed the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, which modified Section 10905 in several respects. Section 402 of the Staggers Rail Act repealed existing Section 10905 and replaced it with a new section which

> creates a mechanism that requires railroads to sell a railroad line approved for abandonment to a financially responsible party if the financially responsible party has offered to pay the acquisition cost of the line or the difference between the revenues attributable to providing that service plus a reasonable return on the value of the line. Section 202 also requires rail carriers petitioning for abandonment of a railroad line to provide interested parties an estimate of the subsidy or the minimum purchase price required to keep the line in operation, calculated in accordance with the new provisions in 49 U.S.C. 10905.
>
> The provisions in section 202 assist shippers who are sincerely interested in improving rail service, while at the same time protecting carriers from protracted legal proceedings which are calculated merely to tediously extend the abandonment process.

Conference Report, H. Rpt. No. 96-1430, 96th Cong., 2d Sess. at 125 (1980).

Amended Section 10905 essentially followed the scheme of the 4R Act, modified to shorten the time periods and to add a procedure whereby the ICC was given the authority to establish "the price and other terms of the sale" in those cases where the parties were unable to reach an agreement. 49 U.S.C. § 10905(f)(1)(C). Moreover, new Section 10905 provided that: "If the carrier and a person offering to purchase a line enter into an agreement which will provide continued rail service, the Commission shall approve the transaction and dismiss the application for abandonment or discontinuance." 49 U.S.C. § 10905(e). That provision modified former Section 1a(6)(a) which had provided that: "Upon notification to the Commission of the execution of such assistance or acquisition

and operating agreement, the Commission shall postpone the issuance of such a certificate for such period of time as such an agreement . . . is in effect."

When the Commission addressed the question of whether employee protection could be imposed in connection with a Section 10905 sale, it concluded that "the applicable statutes neither require nor permit us to do so" for several reasons. Appendix to Petition at 28a. First, the ICC noted that while Section 10905 "is silent on the issue of labor protection" (*id.*), the specific language of the statute required the approval of a sale agreement and the dismissal of the abandonment application. Consequently,

> all conditions qualifying our approval of the abandonment (including labor protection, public use and environmental conditions) must be dismissed as well. In light of the specific directions of the statute, it is inappropriate to find that Congress empowered the Commission to require labor protections under 49 U.S.C. 10905.

Appendix at 28a. That conclusion, the ICC believed, was fortified by the Staggers Rail Act itself, because, in that Act, "Congress gave labor issues intense scrutiny and enacted several express provisions which either required the Commission to impose labor protection or gave the Commission the discretion to impose labor protection." *Id.* "Because of these numerous express provisions for labor protection, it must be presumed that by omitting any similar provisions in 49 U.S.C. 10905, Congress did not intend this power to exist." Appendix at 29a. And finally, the ICC stated that it had issued "many decisions" under Section 10905 which did not include employee protection,[5] and since Congress did not take corrective action, it must be presumed that the ICC's failure to protect employees is what Congress intended. Appendix at 29a-30a.

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[5] Petitioner Simmons has disputed this point factually (*see, Simmons* Reply Br. in 7th Cir. No. 84-1352 at 16 n.25), and in light of the ICC's failure to report those cases in its Annual Reports to Congress (*see*, page 5, *supra*), it is frivolous to assert that Congress failed to take corrective action, for it does not appear that there was any need to take corrective action until the cases at bar.

That conclusion was upheld by the Seventh Circuit in the two *Simmons* cases because the court believed that it was required to give great weight to the ICC's interpretation of its governing statute; the court added that the "Commission's interpretation of section 10905 is reasonable, and we think correct." Appendix at 4a; *see also, id.* at 21a. According to the court of appeals in *Simmons I,* the statute "says nothing about labor-protective conditions and, what is more important, contains no suggestion that the Commission has discretion to impose conditions of any sort on transactions within the statute's scope . . . ." Appendix at 4a. Since Section 10905, unlike other sections of the Act, did not authorize the ICC to impose "such terms and conditions as in its judgment the public convenience and necessity may require," the court concluded that *ICC v. RLEA, supra,* was inapposite and that: "Against this background, the silence of section 10905 on the matter of conditions has a certain eloquence, especially when we consider the active participation of the railroad unions in revisions of the Interstate Commerce Act." Appendix at 5a. *Simmons II* built upon that silence and stated: "When the silence of § 10905 is considered in the light of the extensive consideration given to labor protection in the Staggers Act and the provisions of that Act that refer specifically to employee protection, we cannot say that the Commission's interpretation is unreasonable." Appendix at 21a.

RLEA respectfully submits that in reaching their conclusion that Congress intended to deprive employees of protection in Section 10905 sales, both the ICC and the Seventh Circuit ignored the principles which this Court expressed in *ICC v. RLEA, supra,* and approached the question posed by this case backwards. Instead of asking whether Congress intended to change past practice and prohibit the imposition of employee protection, respondent ICC and the court of appeals placed the burden on the employees and required them to show that Congress specifically intended to impose an employee protection requirement in Section 10905. Here, the Commission, in compliance with Section 10903(b)(2), had imposed employee protections on the abandonment authorizations at issue, and, thus, the question which should have been addressed by the ICC and by the Seventh Circuit was whether those protections

imposed upon the abandonment were abrogated or otherwise cancelled by Section 10905. By imposing the burden on the employees, the ICC and the court of appeals decided an important issue of law in a manner contrary to applicable decisions of the Court.

This Court has long recognized that remedial statutes are to be construed broadly so as to effectuate the purpose for which they were enacted. *E.g., Tcherepnin v. Knight,* 389 U.S. 332, 336 (1967); *Piedmont & Northern Ry. v. ICC,* 286 U.S. 299 (1932). Section 10903's employee protection requirement is clearly a remedial statute and must be construed broadly. *ICC v. RLEA, supra,* 315 U.S. at 376. However, in the cases at bar, neither the ICC nor the Seventh Circuit attempted to read Section 10903(b)(2) broadly.

This Court has previously condemned such a narrow approach to the employee protection question in *RLEA v. ICC, supra,* when the ICC argued, as it does now, that Congress' addition of a specific employee protection requirement in one section of the Interstate Commerce Act negated its implied existence in another; as this Court stated:

> Nor is the petitioners' contention strengthened because Congress did modify § 5(4) in the Transportation Act of 1940. The modifications, so far as relevant here, merely made mandatory with respect to unifications the protections for workers that had previously been discretionary.... To regard them as a restriction on the discretionary power of the Commission with respect to abandonments is not merely illogical. It requires us to impute to Congress a policy of mandatory protection for labor in unifications and no protection at all in abandonments. It is reasonable to suppose that if Congress had intended to make such a distinction, it would have said so more explicitly.

315 U.S. at 379-80 (footnote omitted).

That logic, RLEA respectfully submits, is clearly applicable here. However, the ICC's and the Seventh Circuit's approach to the cases at bar ignored that teaching and used a flawed approach to reach a result which is blatantly false.

According to respondent ICC and to the Seventh Circuit, Congress' silence on the issue of employee protection in Section 10905 sales must be presumed to be a disapproval of such protections because of Congress' expressed concern for labor in other sections of the Staggers Rail Act. That illogic ignores *ICC v. RLEA, supra,* and *United States v. Lowden, supra,* and reaches a conclusion as to legislative intent which is in reality an effort to rationalize the result reached, rather than being an attempt to find the result which Congress intended.

When Congress was considering the legislation which eventually became the Staggers Rail Act, the Senate stated that the goal of its bill "is to allow for the restoration of the rail industry to vigorous and profitable growth." S. Rpt. No. 96-470, 96th Cong., 1st Sess. at 6 (1979). The Senate Committee on Commerce, Science, and Transportation added: "The Committee believes this goal need not be achieved to the detriment of rail labor, shippers, intermodal competitive relationships which foster healthy competition, or any other interest group." *Id.* Section 10905's amendments were included in the Senate Bill (S. 1946, 96th Cong., 1st Sess.) reported out by the above quoted Senate Committee report, and even a cursory review of the final bill shows that Congress did not deviate from its goal to achieve reform without affecting employee interests adversely. Indeed, the Staggers Rail Act is virtually unparalleled in the lengths to which Congress went to protect employees from bearing the costs of deregulating the rail industry. *See,* Pub. L. No. 96-448, *supra,* at §§ 213, 219(g), 221, 223, 226, 227, 401, and 701, 94 Stat. at 1913, 1926, 1931, 1939, and 1959-60.

To assert that Congress' silence in Section 10905 equals Congressional disapproval of employee protection in such cases is to ignore reality and the Act's legislative history, for the real answer to the lacuna upon which the Seventh Circuit so heavily relied is that there is no gap; Congress did not enact a specific employee protection requirement in Section 10905 because there was no need for such a provision since Section 10903(b)(2) mandated protection in abandonment cases and the ICC had previously acknowledged that such protections applied even where the line was sold under Section 10905. *Abandonment of Railroad Lines and Discontinuance of Service,*

supra, 354 I.C.C. at 270. This conclusion is fortified by the testimony of both the ICC and RLEA before Congress during Congress' consideration of the bill which eventually became the Staggers Rail Act.

ICC Chairman A. Daniel O'Neal testified before the Senate Committee on Commerce, Science, and Transportation on November 7, 1979, when the Senate Committee first began to consider S. 1946. Chairman O'Neal supported S. 1946's amendments to Section 10905 but did not indicate in his testimony that the amendments would change existing law by depriving employees of protection. *Hearings on S. 1946, Before the Senate Committee on Commerce, Science, and Transportation,* 96th Cong., 1st Sess. at 107, 131 (1979). RLEA also testified before that same Committee, but on November 13, 1979. *Id.* at 536. Rail labor proposed an amendment to Chapter 109 of the Interstate Commerce Act which, if accepted, would have made employee protection mandatory in all cases under Chapter 109 or involving forced reciprocal switching. *Id.* at 544. Counsel for RLEA explained labor's proposal as follows:

> [RLEA's proposal, which included deleting the protection in 49 U.S.C. § 10903(b)(2)] would provide that same protection for all of the provisions in that title, as well as for employees who might be affected by directed, required reciprocal switching agreements.
>
> Now what that does really is give the employees just exactly what they have now, except in reciprocal switching agreements where those are directed, and in some cases where carriers extend their lines and affect employees that would be protected.

Id. at 539. While Congress did not enact RLEA's proposed provision, it did accept the substance of that proposal and it enacted discretionary protection for employees affected by reciprocal switching (Staggers Rail Act § 223, 94 Stat. 1929) and by extensions of lines (*Id.* at § 221, 94 Stat. 1928). As this Court explained before:

> [T]he contrary conclusion—that abandonments [here, § 10905 sales] were now to be distinguished, although the Commission had made no such distinction in presenting the problem to Congress and

> that Congress approved such a distinction—is at best the product of a set of inferences none of which is free from doubt.

ICC v. RLEA, supra, 315 U.S. at 379.

Although this Court requires federal courts to give due deference to an administrative agencys' construction of its own governing statute (*e.g., Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. ____, 104 S.Ct. 2778, 81 L.Ed. 694 (1984)), that deference "cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *American Ship Building Co. v. NLRB,* 380 U.S. 300, 318 (1965). Unfortunately, that is exactly what has occurred in the cases at bar because the Seventh Circuit permitted the ICC, in the guise of "filling the gap," to distort Congress' intent, to ignore prior decisions by this Court, and to reach a result which all rail employees know was never intended by Congress but which comports with the ICC's post-Staggers Act open antipathy towards employee rights and employee protection.

CONCLUSION

For the reasons set forth above, RLEA respectfully submits that the petition should be granted.

Respectfully submitted,

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Attorney for Railway Labor Executives' Association as *Amicus Curiae*

Date: December 18, 1985

APPENDIX A

Railway Labor Executives' Association Member Organizations

American Railway & Airway Supervisors Association (Division of BRAC);

American Train Dispatchers Association;

Brotherhood of Locomotive Engineers;

Brotherhood of Maintenance of Way Employes;

Brotherhood of Railroad Signalmen;

Brotherhood of Railway & Airline Clerks;

Brotherhood Railway Carmen of the U.S. and Canada;

Hotel & Restaurant Employes & Bartenders International Union;

International Association of Machinists and Aerospace Workers;

International Brotherhood of Boilermakers & Blacksmiths;

International Brotherhood of Electrical Workers;

International Brotherhood of Firemen and Oilers;

International Longshoremen's Association;

National Marine Engineers' Beneficial Association;

Railroad Yardmasters of America;

Seafarers International Union of North America;

Sheet Metal Workers International Association;

Transport Workers Union of America; and

United Transportation Union.